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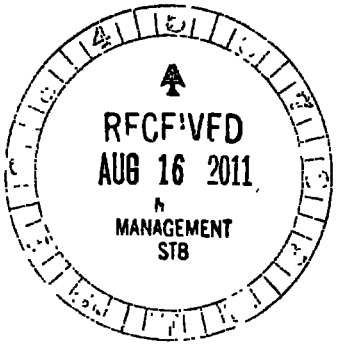
August 16, 2011



Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

RE: STB Docket No. NOR 42056; *Texas Municipal Power Agency v. The BNSF Railway Company*

Dear Ms. Brown:

Please find enclosed an original and ten (10) copies of Texas Municipal Power Agency's Petition for Reconsideration to be filed in the above referenced proceeding. A compact disc is also enclosed with electronic copies of the Petition.

In addition, also enclosed is a check in the amount of $350.00 to cover the filing fee.

If you have any questions, please do not hesitate to contact the undersigned.

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Sincerely,

Sandra L. Brown

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230821

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY Complainant, v. THE BNSF RAILWAY COMPANY Defendant.	)	Docket No. NOR 42056

PETITION FOR RECONSIDERATION

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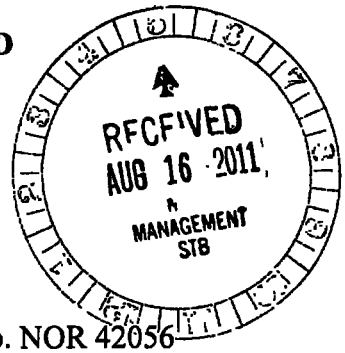
August 16, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD



TEXAS MUNICIPAL POWER AGENCY	)	
Complainant,	)	
v.	)	Docket No. NOR 42056
THE BNSF RAILWAY COMPANY	)	
Defendant.	)	

PETITION FOR RECONSIDERATION

Pursuant to 49 CFR § 1115.3, Texas Municipal Power Agency ("TMPA") respectfully submits this Petition for Reconsideration of the Surface Transportation Board's ("Board" or "STB") July 27, 2011 decision in this proceeding ("Decision"). In the Decision, the Board denied TMPA's Petition for Enforcement ("Petition") and effectively erased the last 10 years of relief from the 20-year period used to calculate the maximum reasonable rate in this proceeding. TMPA respectfully requests that the Board reconsider its Decision.

SUMMARY OF ARGUMENT

The challenged BNSF tariff rate, over a 20-year period, was determined to be unlawfully high by the Board in a decision served in 2003. Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, 6 STB 573 (2003) ("TMPA 2003"). The Board ordered reparations and prescribed maximum reasonable rates for TMPA's Powder River Basin coal transportation. Id. The Board modified its decision slightly in a reconsideration decision served September 27, 2004, 7 STB 803, ("TMPA 2004") and a technical corrections decision served October 29, 2004, collectively "TMPA Rate Decisions." TMPA filed its Petition

immediately upon learning that BNSF was asserting that the TMPA Rate Decisions limited TMPA's relief to 10 years. The Decision denied TMPA's Petition for Enforcement on the asserted basis that the TMPA Rate Decisions were clear that TMPA's relief was limited to 10 years. With its Decision on July 27, 2011, the Board has nullified the entire foundation of the TMPA Rate Decisions. Thus, the Decision contains material error, as described below.

First, the Decision errs in as much as the Board ruled that the language of the TMPA Rate Decisions clearly limited TMPA's relief to 10 years of the 20-year analysis period. The 20-year analysis and 20-year relief period was the established precedent at that time. The evidence submitted by the parties and the logic of the TMPA Rate Decisions were all predicated on 20 years. The TMPA Rate Decisions did not acknowledge or explain this alleged deviation from the past precedent. Thus, the Board's Decision claiming now that TMPA should have assumed the Board had deviated from the evidence, precedent and logic, is material error.

Second, the Decision errs in as much as the Board ruled that TMPA's netting evidence was untimely. TMPA raised the netting issue in its Petition as evidence of the 20-year rate relief period. TMPA has not objected to the netting process, which was also an established precedent at that time. Most importantly, the netting only made sense under the established 20-year analysis and 20-year rate relief period precedent. TMPA reasonably relied on the netting process as the underlying logic to support the established 20-year analysis and 20-year rate relief period for TMPA Rate Decisions.

Finally, the Board erred to the extent it retroactively applied the 10-year Discounted Cash Flow ("DCF") rule. Any implication that the Decision is justified today because the rule for rate cases is now 10 years is material error as an unlawful retroactive application of the new rule on the TMPA Rate Decisions.

ARGUMENT

I. THE BOARD'S DECISION WAS IN ERROR IN RULING THAT THE LANGUAGE OF THE PRIOR DECISIONS LIMITS TMPA'S RELIEF TO 10 YEARS OF THE 20-YEAR DCF ANALYSIS

A. At The Time Of The TMPA Rate Decisions, The Standard Analysis And Prescription Period Was 20 Years

TMPA respectfully disagrees that the TMPA Rate Decisions clearly stated that TMPA was entitled to only 10 years of rate relief out of the 20-year analysis period. For the Board to deny TMPA's Petition on that basis is material error. The evidence presented by both TMPA and BNSF was predicated on 20 years. The Board's precedent and the logic of the TMPA Rate Decisions were predicated on 20 years. The Board's TMPA Rate Decisions said nothing about deviating from the Board's precedent or the party's evidence, nor did it explain any supposed deviation from this evidence, logic and precedent. Instead, the Board apparently expected TMPA to assume that the Board was deviating without any description, acknowledgment, or explanation of this departure. This is classic material error. See New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177 (DC Cir. 2004); Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board, No. 04-1162 (DC Cir. 2005) and WLOS TV, Inc. v. Federal Communications Commission, 932 F.2d 993 (DC Cir. 1991). The Board then concludes its Decision with a "gotcha" by claiming that TMPA is now tardy in relying on the Board's established precedent and logic which hid the unexplained deviation.

TMPA does not dispute that the Board's rules now limit DCF analysis and the corresponding rate relief to 10 years, but that was not the established landscape at the time of the TMPA Rate Decisions. In fact, at the time that the TMPA Rate Decisions were issued, the 20-year period was the clearly established rule. The 20-year period was recognized at least starting in the 1980's when the Interstate Commerce Commission ("ICC") stated: "In previous

proceedings, we have limited the time period over which the DCF calculations were made to 20 years." Nevada Power I, Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 6 ICC2d 1, 67 (n. 27) (1989)[1].

The ICC continued to employ the 20-year DCF period and prescribe rates for that same 20-year period. Coal Trading Corporation v. B&O Railroad Company, 6 ICC2d 361, 380 (1990). Likewise, in West Texas Utilities, the Board set the prescribed rate at 180% R/VC for the 20-year DCF period. West Texas Utilities v. Burlington Northern Railroad, 1 STB 638, 679 and 716 (1996). In APS, the Board prescribed rates for the 20-year DCF period based on the percent reduction method. Arizona Public Service v. Atchison, Topeka & Santa Fe Railway, 2 STB 368, 394-395 and 446-448 (1997). The use of a 20-year model was also upheld by the D.C. Circuit in Burlington Northern Railroad Company v. Surface Transportation Board, 114 F.3d 206, 215 (D.C. Cir. 1997).

A look at the Board's website, at http://www.stb.dot.gov/stb/industry/Rate_Cases.htm, shows that between 1996 and the Board's TMPA Rate Decisions there were 15 rate cases decided, including TMPA's. Of those 15 cases, the Board issued decisions finding the rates unreasonable in only five cases, including TMPA. Each of those four other cases that preceded TMPA's case used a 20-year analysis period and ordered reparations and/or prescribed rates for the same 20-year period. Specifically, in West Texas Utilities (decided in 1996), the analysis

[1] In a subsequent decision in the Nevada Power proceeding, the ICC revealed that a 25-year analysis period was used, apparently upon the agreement of the complainant and defendant. Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 10 ICC2d 259, 275 (n. 24)(1994) ("Nevada Power II"). In Nevada Power II, the rates were found reasonable, so there was no rate prescription. 10 ICC2d at 279.

covered 20 years and the relief period was also 20 years.[2] 1 STB 638, 677 and 711 (Appendix E).

In a case decided in 1998 with similarities to TMPA, a 20-year analysis was used and a 20-year relief period was imposed. APS, 2 STB 368, 390 and 452 (Table F-6). Importantly, in APS, eight of the 20 years resulted in a zero reduction under the netting, including six of the last 20 years of the prescription, so that over the 20-year period the overpayments and shortfalls netted out, yet the relief covered the entire 20-year period. APS, 2 STB at 390 and 452 (Table F-6).

Two years later, the Board again employed the 20-year analysis period and a 20-year relief period. FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, 4 STB 699, 740-741 and 848-849 (Table E-1)(2000). In FMC, the Board established the stand-alone cost ("SAC") rate for each of the 20 years but did not set an actual prescribed rate for the prescription years because the Board found that the SAC rate was expected to be below the jurisdictional rate floor from the start. FMC, 4 STB at 849 and 851–865 (Table F-1 through Table F-15).[3] In the last major case before TMPA, the STB again used a 20-year analysis period and ordered rate relief for that same 20-year period. Wisconsin Power & Light v. Union Pacific Railroad Company, 5 STB 955, 984-987 (2001); and slip op at 6 (served May 14, 2002).

The pervasiveness of the 20-year DCF analysis period, where rate relief is spread across the entire 20-year period, is reinforced by the fact that cases decided after TMPA Rate Decisions

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[2] West Texas Utilities differs from TMPA only in that the revenues exceeded costs for each of the 20 years.

[3] TMPA acknowledged in its Petition that BNSF is entitled to the 180% R/VC rate if BNSF proves it will be higher in any year of the full 20-year period, but that issue is not before the Board. TMPA Petition at 2, n. 1.

also relied on the 20-year period for analysis and rate relief. Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, 7 STB 589 (2004).

Furthermore, when the Board sought to change the rule after the TMPA Rate Decisions, the Board itself recognized that "[h]istorically, the parties have used a 20-year analysis period." Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 61 (served Oct. 30, 2006). In addition, in rejecting the proposal for an indefinite rate prescription, the Board found that "[t]he best policy is to tie the length of the rate prescription to the length of the SAC analysis." Major Issues at 65. The Board also stated that its proposal was to "shorten the time frame for the SAC analyses and corresponding rate prescriptions from 20 years to 10 years." Major Issues at 4.

The Board's citation in the Decision to Major Issues at footnote 6 demonstrates the Board's arbitrariness in ruling against TMPA now. In footnote 6, the Board seems to justify the Decision by mentioning that it "noted in 2006 that most rate prescriptions in large rail rate cases ended after 10 years" and cited to pages 65-66 of Major Issues. However, the Board ignores its own reasoning for this sentence that is discussed several pages earlier in Major Issues. The Board discussed that the reason that rate prescriptions tended not to endure longer than 10 years was because of substantial changed circumstances where the parties re-litigated by reopening or asked the Board to vacate the prescription. Neither of these events have occurred in TMPA. The Board then cites to APS (reopened because the coal mine would run out of coal before the end of the 20-year period) and West Texas Utilities (shipper sought to ship from mines not included in the original stand-alone railroad ("SARR")) rate cases. Major Issues at 62. Nowhere in Major Issues does the Board say that any prior rate prescription had been ordered for only 10 years out

of the 20-year analysis period. If this fact was clear in the TMPA case, this would have been an extremely compelling reason for the Board to cite to TMPA in Major Issues (thus supporting the change to a 10-year analysis period). Yet, there is no mention in Major Issues of the idea that the TMPA rate prescription was only 10 years despite the 20-year analysis and netting used. In fact, the Board specifically stated that the new 10-year DCF analysis period would not apply to the pending Western Fuels and AEP-Texas[4] cases because "[t]he parties had already designed SARRs with sufficient rail capacity to handle projected traffic growth through 20 years, and shortening the DCF period would require the parties to redesign their entire SAC presentations." Major Issues at 75. This reasoning obviously also applies to the TMPA case, where both parties "had already designed SARRs" to handle 20-years of traffic, and use of a 10-year analysis "would require the parties to redesign their entire SAC presentations."

Moreover, in a decision issued just after TMPA 2004, the Board denied a request of a shipper to truncate the analysis period at the point that the forecast revenue fell below the revenue requirements of the SARR. Duke Energy Corp. et al. v. Norfolk S. Ry, et al., 7 STB 862, 878 (2004). The shipper's desire to truncate the analysis period was an attempt to carve out the later years that were not favorable to the shipper. In essence, the Board's Decision does the reverse in favor of BNSF now. By permitting BNSF to charge whatever rate it wants to charge now for the last 10 years of the 20 year analysis, the Board is allowing BNSF to truncate the rate prescription period despite the evidence having covered a 20-year period.

B. The Analysis And Prescription Period In The TMPA Rate Decisions Was 20 Years

In TMPA 2003, the Board states early in that decision that it is using a 20-year period and

[4] Western Fuels and Basin Electric Cooperative v. BNSF Railway Company, STB Docket No. 42088; AEP – Texas North v. BNSF Railway Company, STB Docket No. 41191.

that the SAC test will "determine the rate that that the SARR[5] would need to charge to the complainant each year, and hence the maximum reasonable rate that the complainant should pay the defendant carrier for equivalent service each year." 6 STB at 587. The Board was focused on making sure that "over the multi-year analysis period, there would be no net over- or under-recovery." Id. The Board then found that, on a present-value basis over the entire 20-year SAC analysis period, the SARR would generate revenues in excess of costs, thus indicating that the challenged tariff rate was too high. 6 STB at 607. The Board stated that "[i]n applying the SAC test, we compare the estimated revenues that the GCRR would earn over the 20-year analysis period to the estimated costs of constructing and operating the hypothetical rail system. As in prior cases, a DCF analysis is used to discount the GCRR's 20-year stream of estimated revenues and costs to a common point in time." 6 STB at 748.

The TMPA 2003 decision mentions the 20-year period two more times in just the next paragraph alone and states that the reductions were done to avoid any over- or under-recovery in the full 20-year SAC analysis period. Id. In addition, in the Note to Table E-1, the Board discusses this second half of the 20-year period and states that the DCF model limits the revenue reductions in the first half in order to "offset the underpayments that would occur in 2012 through 2021." 6 STB at 749. All this language is nonsensical if the Board intended that BNSF could charge anything that it wanted to in the second half of that 20-year period. There would be no "underpayments" requiring an earlier revenue reduction if the Board did not expect BNSF to charge, and in fact base its decision on BNSF charging, the challenged rate in the second half of the 20-year period.

[5] The SARR in this case was known as the Gibbons Creek Railroad or the "GCRR."

Moreover, the Board noted that there was no dispute as to the total revenues for the GCRR in 2001 – 2004, and the dispute for forecasting revenues post-2004 was related to how the rates would be escalated after the expiration of the existing contracts. However, the Board clearly references that it based the rate for TMPA's traffic on the challenged BNSF tariff using the escalation provision contained within the tariff for the entire SAC analysis period. 6 STB at 601 and note 64. BNSF did not object to the use of this rate to determine the revenues of the SARR and this key factor relied upon in the TMPA Rate Decisions cannot be unilaterally changed with no explanation of the departure from past precedent.

Later, in reconsideration, the Board again determined that the "sum of the present values of over-recoveries exceeds the under-recoveries, thus demonstrating that the existing rate level is too high." 7 STB at 831. While the Board made further refinements and corrections in TMPA 2004 and a later clarification, the basic framework remained the same as that in the original TMPA 2003: SARR revenues exceeded stand-alone costs for the first portion (10 years in the final analysis) of the 20-year period, but stand-alone costs exceeded revenues for the remaining years and, overall, revenues exceeded costs for the 20-year period. The Board repeated that the "DCF model computes and distributes the total cost of the GCRR over the 20-year analysis period." TMPA 2004 at slip of 29. The decision also stated that netting would ensure that "over the entire 20-year SAC analysis period this traffic group would generate just enough revenue to cover the GCRR's revenue requirements." Id. The Decision again repeats the note to the Revised DCF Analysis table and states that the DCF model limits the revenue reductions in the first half in order to "offset the underpayments that would occur in 2011 through 2021." Those "underpayments" were based on the BNSF tariff rate as escalated, which then equaled the SAC rate for years 2011 through 2021. The language of the decision then stated that "the prescribed

rate is the higher of the SAC rate ... or the regulatory rate floor"[6] with no discussion or mention of the Board's alleged departure from its prior precedent for the 20-year prescription period. TMPA 2004 at slip op 31.

Importantly, neither TMPA nor BNSF argued for a 10-year prescription period.[7] While BNSF asserted that its rates were reasonable and no relief was due in any year, BNSF and TMPA's evidence were based on the full 20-year analysis period. BNSF's narratives, the Reply Verified Statements by witnesses Christopher D. Kent and John C. Klick, and supporting workpapers were based on the 20-year analysis period. No party addressed the issue of the rate prescription length because the precedent was clear that the analysis and prescription period were the same. The Board's assertion that the TMPA Rate Decisions clearly limited TMPA's relief and that TMPA is tardy in not realizing that the Board had cut TMPA's relief in half is material error. The Decision does not (because it cannot) point to any mention or discussion of the deviation from the party's evidence, the Board's precedent or logic in the TMPA Rate Decisions that would support this conclusion. The Board's Decision, in essence, unlawfully reopens the TMPA Rate Decisions and revises it by disregarding the key underpinnings of the case without the requisite due process.

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[6] TMPA acknowledges that the referenced table has a black box, for the STB Prescribed Rate column for years 2011 through 2021, but in light of the parties evidence, other language in the TMPA Rate Decisions, the netting, the 20-year analysis period and the past precedent, the box is hardly a clear indication that BNSF would be free to charge any rate that it wanted notwithstanding the published SAC rate in the table that was used to calculate the rate for the entire 20-year period.

[7] The Board's Decision effectively releases BNSF from the 20-year rate period and nullifies TMPA's rate relief, which the Board recognized that TMPA asserts is legislative in nature. Thus, the Board's Decision also deprives TMPA of its constitutional rights without due process. See, e.g., St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).

With the 20-year SAC DCF analysis period (and the percent reduction method) inherent in the governing rules at the time, TMPA was not just challenging the BNSF tariff rate that existed in 2001 when TMPA filed its complaint, TMPA was challenging the total amount that TMPA would pay BNSF over the entire 20-year period. It is that total amount that was found unreasonable by the Board. In implementing its finding, the Board reduced the benefit to TMPA in the first ten years to account for the tariff rate level over the entire 20-year period. To allow BNSF to change the tariff rate level for years 11-20 would upend the entire analysis. Permitting any rate to be charged during the 2011-2021Q1 time period other than the rate relied upon by the Board in the DCF analysis would subvert the "offset" created by the Board and directly contradict the TMPA Rate Decisions.

Furthermore, the Decision makes no mention of the precedent presented by TMPA in its Petition that the "the SAC analysis assumes that the defendant railroad would adhere to the rate that it has selected, adjusted by the appropriate index." APS, slip op. at 7 (served Dec. 13, 2004). This finding was made in similar circumstances in which the Board determined that it could not set the maximum rate above the challenged rate because if it could do so there would be no need for a netting proceeding. Id. In APS, the Board clearly prescribed the putative challenged tariff rate for several years. APS, 2 STB at 448 ("The shaded rates arrayed in column 15 of Table F-6 are the resulting maximum rates which Santa Fe may charge Arizona") and 452 (Table F-6 shows no percent reduction from putative tariff rate for years 2003-2004 and 2008-2013). Without a clear explanation of its departure from the past precedent, the Board cannot now refuse to recognize the same result is required in TMPA. The Board's failure to abide by this precedent is material error.

Finally, the Board's abrupt departure from its past precedent of using a 20-year analysis and 20-year relief period constitutes material error under the Administrative Procedure Act ("APA") (5 U.S.C.S. § 561 et seq.) which provides that a reviewing court "shall hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.S. § 706(2)(a) (2000). The Supreme Court interpreted this section of the APA as imposing a procedural requirement "mandating that an agency take whatever steps it needs to provide an explanation" for its actions. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 654 (1990). Accordingly, under APA § 557(3)(A), the Board is required to include with each order "a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record."

The Seventh Circuit held that, should the Interstate Commerce Commission, now the Board, change long-standing policy abruptly, "it must give a reason why; otherwise its behavior is arbitrary and capricious and therefore a violation of the Administrative Procedure Act." Illinois v. Interstate Commerce Comm'n, 722 F.2d 1341, 1348 (7th Cir. 1983). The Third Circuit likewise noted that "where an agency departs from established precedent without announcing a principled reason for such a reversal, its action is arbitrary." Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807 (3rd Cir. 1985). And the D.C. Circuit held that "[w]hile agencies may not be bound under the doctrine of *stare decisis* to the same degree as courts...it is at least incumbent upon the agency carefully to spell out the bases of its decision when departing from prior norms." Food Mktg. Inst. v. Interstate Commerce Comm'n 587 F.2d 1285, 1290 (D.C. Cir. 1978) (citations omitted). See also New York Cross Harbor Railroad v. Surface Transportation Board, 374 F.3d 1177 (DC Cir. 2004) (Board acted arbitrarily and capriciously when it failed to

explain its departure from precedent); Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board, No. 04-1162 (DC Cir. 2005) (agency must provide reasoned explanation and substantial evidence in the record to apply different standards) and WLOS TV, Inc. v. Federal Communications Commission, 932 F.2d 993 (DC Cir. 1991) (agency must recognize and explain any departure from its precedent with the requisite forthrightness and clarity). The post hoc finding that the TMPA Rate Decisions clearly only provided relief for 10 years was without any explicit detailed reasoning and failed to address the precedent and other language in the decisions that support a 20-year conclusion, and thus constitutes material error.

II. THE BOARD'S DECISION WAS IN ERROR IN RULING THAT TMPA'S CONCERN ABOUT NETTING WAS UNTIMELY

TMPA raised the netting issue in its Petition as evidence of the 20-year rate relief period. TMPA has never (in 2003, 2004, or now) objected to the netting process which was established since at least 1990 in Coal Trading, 6 ICC2d at 436-437. In addition, TMPA did not object to the netting in the TMPA Rate Decisions because the language in the Board's decisions discussed that the reason for the netting was to account for the full 20-year period. Thus, it was reasonable for TMPA to believe that this meant that TMPA's relief corresponded to this same 20-year period. It is material error to rule that it is untimely for TMPA to raise the netting issue as evidence that the Board's decisions for TMPA were based on a 20-year period.

Again, the APS rate case provides compelling proof to support why the netting is evidence that the rate relief covered the entire 20-year analysis period. In this case, the percent reduction method was more definitively adopted. The Board made "modifications" to the percent reduction method used by APS, however. In particular, the Board stated that:

> We have made three modifications to the percentage rate reduction method used by Arizona, however. First, in its computations, Arizona did not provide for netting of revenue shortfalls and overpayments over the 20-year SAC analysis

> period. Netting is essential, however, because without it the railroad would have no means to recover the revenue shortfalls that would be incurred in certain periods. The netting procedure balances out overpayments and shortfalls so that the sum of the present value of all overpayments and shortfalls for the 20-year DCF period equals zero.
>
> Second, because the SAC-based rates calculated under this method would, without further modification, increase (under the inflation indexes used by the parties) at a faster pace than Santa Fe's rates are projected to increase (applying the RCAF-U to the Salt River rate and the RCAF-A to the Arizona rate), we must limit the AGRR rates so that they would not exceed Santa Fe's rate levels during the 20-year period. In our SAC analysis, we cannot assume that the AGRR could collect a higher rate than Santa Fe charges for the same traffic.
>
> Third, we must limit the SAC-based rate so that it does not fall below 180% of Santa Fe's R/VC level for the Arizona traffic. We cannot prescribe a rate below that threshold jurisdictional level. *See West Texas*, 1 STB at 677-678.
>
> Each of these three constraints (using a netting procedure, using Santa Fe's rates as rate ceilings, and using Santa Fe's 180% R/VC level as a rate floor for the Arizona traffic) is necessary. However, each of these constraints can affect the outcome in a way that affects the application of the other two constraints. In other words, the constraints are interdependent. To apply them in concert requires an iterative computational process encompassing both an initial calculation and a recalculation. This process is described in Appendix F and the results are summarized in Tables F-1 (initial computation) and F-2 (final computation). The resulting maximum reasonable SAC-based rates for the Arizona traffic on a quarterly basis are shown in column 15 of Table F-2.

APS, 2 STB at 393. The STB made the adjustments in APS, used the netting over the 20-year period and provided for 20 years of relief notwithstanding the fact that in some years the reduction from the challenged rate was zero.

To address this situation in TMPA Rate Decisions, where the 20-year analysis revealed an overall over-recovery by the SARR but where there were not over-recoveries in each of the 20 years, the Board "limit[ed] the revenue reductions in 2001 through 2010 to 49% of the overpayments, in order to offset the underpayments that would occur in 2011 through 2021." 7 STB at 831. By this method, the Board ensured that "over the entire 20-year period the GCRR would earn just enough to cover all its costs and earn a reasonable return of its investment." 6

STB at 607. This use of "netting" across the entire SAC analysis period comported with long-standing ICC and Board precedent. Xcel, 7 STB at 599; Coal Trading, 6 ICC2d at 435; Nevada Power II, 10 ICC2d 259, 278; APS, 2 STB at 393 ("The netting procedure balances out overpayments and shortfalls so that the sum of the present value of all overpayments and shortfalls for the 20-year DCF period equals zero.").

As TMPA explained in its Petition, simple arithmetic corroborates what the Board did and why TMPA relied on what the Board did for the 20 year period. As an example, the Board's TMPA 2004 reveals that, for 2009, the SARR revenues ("BNSF Forecast Revenues") were $1,043.9 million and costs ("GCRR Revenue Requirements") were $1,021.6 million, a difference of $22.4 million. 7 STB at 831. This difference represents an over-recovery by the SARR of (22.4)÷(1,043.9)=2.15%. However, the same table clearly shows that the Board reduced the challenged 2009 BNSF rate by only 1.05%. The Board did not apply the full 2.15% reduction for 2009 because of the need to "offset the underpayments that would occur in 2011 through 2021." 7 STB at 831. The Board applied a reduction of only 1.05%=(2.15)*(0.49).

In other words, TMPA received only 49% of the appropriate reduction to "zero-out" the later years of the 20-year rate prescription. The 49% figure was determined by dividing the cumulative 20-year SARR over-recovery ($108.2 million) by the sum of the over-recovery ($221.5 million) for those individual years (2001-2010) where an annual over-recovery occurred. 7 STB at 831 (noting that the reduction for 2001 through 2010 was limited to "49% of the overpayments"). Thus, BNSF must be prohibited from charging anything other than the "Tariff Rate" (a.k.a, the "SAC Rate") listed on page 2 of the TMPA 2004 through the first quarter of 2021.

In addition, the Board's cursory dismissal of TMPA's evidence on netting as the basis for the 20-year relief period completely ignores the issue raised by TMPA that it has justifiably relied on the Board's decision and established 20-year precedent. TMPA has planned its finances, debt service, and operations around the transportation costs included in the decision through 2021Q1. As stated in its Petition, prior to BNSF informing TMPA of its desire to raise TMPA's rates, TMPA and its four Member Cities completed a complex financial agreement regarding debt service and cost sharing. In particular, the four member cities refinanced TMPA debt earlier in 2010. The transportation costs inherent in the Board's maximum reasonable rate determination in this case were taken into consideration in relation to this financing, and it is likely that it would have been structured differently had the assumption been used that the Board's maximum reasonable rate determination would no longer be in place commencing in 2011. For TMPA, rail transportation costs are a significant component of its financial planning process. Rail transportation costs are a significant component of TMPA's total variable costs. TMPA relied upon the Board's 20-year maximum reasonable rate determination in its financial planning at least through 2018. TMPA will experience very high fixed costs during the five-year period from 2013 through 2017, and a high average cost of energy, due largely to debt service on bonded indebtedness that cannot be economically refinanced by TMPA.

TMPA has reasonably relied on the Board's decision because of the 20-year DCF analysis and the Board's description of the netting process. For BNSF to suddenly and unilaterally be permitted to charge a higher rate would cause untold problems for TMPA and its four member cities. Moreover, it would upset the integrity of the Board's processes and would constitute material error. Given the millions of dollars in legal and consultant fees that are

required to litigate a rate case under the Coal Rate Guidelines, 1 ICC2d 520 (1985), the Board should ensure that TMPA obtains the full benefit of the 20-year analysis period.

Moreover, the Board's Decision constitutes material error because the Board does not even address the issue raised by TMPA that BNSF should be held to its commitment because the Board precedent supports that BNSF be held to a key underpinning in any proceeding. See APS, slip op. at 7 (served Dec. 13, 2004) ("the SAC analysis assumes that the defendant railroad would adhere to the rate that it has selected"). See also, Union Pacific Corporation et al. – Control and Merger – Southern Pacific Rail Corporation ,et al., 4 STB 879, 881-885 (2000) (Board requires Union Pacific to abide by terms of UP-BNSF Agreement, which underpinned Board approval of the UP-Southern Pacific merger). It cannot be untimely to raise an issue that was an established part of the SAC analysis. In other words, TMPA had no way to predict that the Board would later deviate from both its precedent and the underlying logic of the TMPA Rate Decisions.

The Board's unsupported conclusion that the raising of the netting issues was untimely is material error. The Board fails to take into account that TMPA raised the issue as evidence of the 20-year relief period and not as an objection to the netting process. Furthermore, the Board failed to even discuss how the netting and other language in the TMPA Rate Decisions, along with past precedent, would have resulted in justifiable reliance on the Board's 20-year period.

III. THE BOARD'S DECISION WAS IN ERROR BECAUSE IT RETROACTIVELY APPLIES THE 10-YEAR DCF RULE

While the Board's discussion of reopening appears to be dicta, the Board provided three reasons for why it was not reopening its decisions on its own initiative. Of course, there would be nothing to reopen if, as the Board declares, the prior decisions were clear that TMPA's relief ended after 10 years notwithstanding the fact that the rate during those 10 years was established

based on the 20-year DCF analysis period. Yet, the main thrust of the discussion on reopening appears aimed at justifying the Board's Decision by pre-judging that any alleged changed circumstances would all be in favor of the railroad and that TMPA would not be entitled to any relief anyway under a 10-year DCF analysis period.[8] As discussed above, the 10-year DCF period did not become the rule until five years after TMPA filed its rate case and nearly two years after the last decision in 2004.

Any implication by the Board that its Decision is justified today because the rule now for rate cases is that a 10-year DCF analysis period and 10-year prescription is used, is material error. The precedent against the retroactive application of rules is unambiguous. Bowen v. Georgetown University Hosp., 488 U.S. 204 (1988)(finding that HHS without authority to promulgate retroactive cost-limit rules); Landgraf v. USI Film Products, 511 U.S. 244 (1994) (affirming a refusal to grant retroactive operation of the Civil Rights Act of 1991); Western Fuels Assoc. Inc. v. BNSF Railway Co., STB Docket No. 42088, p. 22 (served Feb. 17, 2009) (citing the standard in Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553-54 (DC Cir. 1993). At the time of the TMPA Rate Decisions there was a clear policy for the 20-year period. Thus, retroactive application of the 10-year rule to TMPA's rate case is material error. Moreover, the

[8] The Board's Decision also appears inappropriately swayed by the fact that BNSF asserts that changed circumstances such as fuel costs would have, according to BNSF, resulted in no rate prescription even before 2010. The Board does not even mention TMPA's response on January 18, 2011 that supported that the SAC analysis may have overestimated the reasonable rate level. TMPA does not dispute that BNSF always had the right to assert that the maximum reasonable rate cannot be below 180% revenue-variable costs percentage (R/VC) but BNSF had not asserted that until this issue arose and BNSF did not previously attempt to show or charge a different rate than the SAC rate. If in fact BNSF felt its costs had dramatically increased, it would have been an imprudent business decision to not enforce its right to get its increased costs covered under the jurisdictional threshold. So for the Board to be swayed by BNSF's unfounded assertion is material error.

Board itself declined to apply the 10-year rule to then pending cases when it decided Major Issues.

CONCLUSION

For all the reasons set forth herein, TMPA respectfully requests that the Board reconsider its July 27, 2011 Decision and issue a decision consistent with the Board's precedent by declaring that the rate that BNSF may charge for rail transportation of coal from the PRB to Gibbons Creek through March 31, 2021 was determined in the TMPA Rate Decisions.[9]

Respectfully submitted,

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August 16, 2011

[9] As previously stated, TMPA acknowledges that, under 49 USC § 10707, the maximum reasonable rate cannot be below 180% revenue-variable costs percentage (R/VC). However, BNSF has not formally raised this issue or provided the necessary evidence to prove that its R/VC exceeds 180% and this must be done under the methodology used in this case, including movement specific adjustments.

CERTIFICATE OF SERVICE

I certify that on this 16th day of August 2011, I caused a copy of the foregoing to be served by hand delivery upon the following:

Samuel M Sipe, Jr.
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by Federal Express to the following:

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and upon regular mail to all parties of record.

David E. Benz